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Cases Cited

SUPREME COURT OF THE UNITED STATE

QUEEN INSURANCE COMPANY OF AMERICA,
Petitioner-Libellant,

AGAINST

THE GLOBE & RUTGERS FIRE INSURANCE COMPANY,
Respondent.

OCTOBER TERM, 1923
No. 116

BRIEF FOR RESPONDENT

Statement of the Case

This is a writ of certiorari in review of the affirmance by the Circuit Court of Appeals for the Second Circuit of a final decree of the United States District Court for the Southern District of New York, dismissing the libel. The suit arises out of the loss of certain cargo shipped on board the Italian S. S. *Napoli,* one of a convoy of cargo vessels proceeding from Gibraltar to Genoa, which collided with the *Lamington,* one of another convoy of similar vessels proceeding from Genoa to Gibraltar. The cargo was covered both by a "marine" policy issued by the libellant and by a "war risk" policy issued by the respondent. Each underwriter by agreement, and without prejudice, paid the insured one-half the amount to which he was entitled. The libellant, having succeeded

to the rights of the cargo owner, brought this suit against the war risk underwriter to recover as of right the amount not already advanced by the respondent. The case was tried before Hough, *C. J.*, who dismissed the libel, on the ground that the collision was caused, not by hostilities or warlike operations or consequences thereof, but by negligence, and that the loss must fall upon the marine underwriters (Opinion, fols. 243-269 of the Record; final decree, fols. 270-1). The decree of the District Court was unanimously affirmed by the Circuit Court of Appeals (Record, fols. 278-296).

Statement of Facts

On June 30, 1918, the Italian steamship *Napoli*, bound from New York to Genoa, left Gibraltar in a convoy of about twenty vessels. The convoy was arranged in three ranks or tiers. In the first tier there were seven ships, and a smaller number in the second and third. The *Napoli* was the middle ship in the first tier.

The convoy was escorted by six small vessels of the British, Italian and American Navies under command of Captain Ryan of the British Navy. The navigation of the convoy was entrusted to the convoy commodore, Commander Ignasio of the Italian Navy, aboard the *Napoli*. He was subject, however, to the orders of Captain Ryan, as the senior naval officer present.

The vessels were routed to pass through certain designated positions until they reached 42° 58′ N. and 7° 50′ E., the Genoa rendezvous, from which position they were to proceed according to instructions from Genoa, which,

so far as appears, were never given. Owing to exceptionally fine weather and smooth sea on the evening of July 4, 1918, the convoy was nearly twenty-four hours ahead of its schedule. At 8 P. M. its position was 42° 40′ N. 7° 48′ E.

On the morning of July 4, 1918, a convoy of similar vessels left Genoa for Gibraltar. This convoy was composed of seventeen vessels in three tiers. There were eight vessels in the first tier, either five or six in the second, and three in the third. The commodore ship was the *Ansoldo III,* which was the fourth vessel in the first tier (counting from port to starboard). She was followed by the *Plymouth* in the second tier; the *Lamington,* a British vessel, was in the same tier on her port side.

This convoy was commanded by Rear Admiral Siccardi, of the Italian Navy, aboard the *Ansoldo III.* As he was the senior naval officer present, his authority also extended to the five escorting naval vessels. These escorting vessels were operating on the flanks and astern, like those escorting the eastbound convoy. No orders to pursue fixed courses were given this fleet; after forming, it was merely to take "courses according to the signal of the Commodore".

Vessels in each tier were expected to remain (from beam to beam) about 500 yards apart; the distance between tiers (fore and aft) was about 600 yards, save that when the convoy was zigzagging the distance was lengthened to about 800 yards. These are the distances for the eastbound vessels; those for the westbound were slightly shorter. Thus the eastbound convoy presented a front from the port to the starboard escort (the escorts' positions were 400 yards off the flanks) of somewhat

less than two nautical miles; the westbound convoy somewhat over that distance.

The vessels were not required by any governmental authority to sail in convoy, although it is clear that they would have incurred greater risk by going alone. Hence the custom of going in convoy was almost universal. If a vessel joined a convoy, it was required to conform to instructions as to courses and management given by competent naval authorities. These instructions came from shore or station authority at either end of the Gibraltar-Genoa line; from the senior naval officer present with the convoy, who enforced the general orders and exercised his own judgment in departing from them in details if necessary; and from the commodore of the convoy, who carried his flag on a merchantman and sought to keep the other cargo boats in formation, regulating the speed and other details pertaining to their navigation. All vessels were expected to keep their lights screened, but ready for instant exhibition.

The convoy proceeded without incident until about 7 P. M. of July 4th, when the *Merida*, a cargo vessel in the West-bound convoy, was torpedoed. The fleet immediately began to zigzag, but the base course does not seem to have been changed until 8:30 P. M., when it was set at 247° true, *i. e.*, about W. S. W., in accordance with directions given before the attack. At 10:30 P. M. the course was changed to 261° true, *i. e.*, about W. by S., and maintained until the convoys met.

In these circumstances the convoys met about midnight of July 4 midway between northeastern Corsica and France, a passage between 95 and 100 miles wide. As the convoys, upwards of thirty-five vessels with their

accompanying escorts, divided into two approximately equal fleets, approached, the speed of the westbound convoy was 7.3 knots an hour and that of the eastbound about the same. The leading tier of each convoy picked up the loom of vessels in the other at a distance of about three-quarters of a nautical mile, each thinking the other was on an opposite course. Both immediately turned on their navigating lights.

Their courses and speeds were such that, if maintained, there would have been a collision between the *Napoli* and the *Ansoldo III*. This was avoided by the vessels passing port to port, each porting her helm. Most of the vessels slowed to steerageway, held their courses as closely as possible, and passed down through the lanes between the fore and aft columns of ships, avoiding collision. The *Napoli*, however, after porting did not straighten up on her course, but stopped directly in the path of the *Lamington*, which was traveling from 500 to 800 yards on the port quarter of the *Ansoldo III*. The *Lamington* maintained her speed of at least six knots until the collision. The *Lamington* struck the *Napoli* on the port side almost at right angles, sinking her.

The District Court's findings of fact with respect to the navigation of the convoys, which have been summarized in the foregoing statement, will be found at folios 246-257 of the Record.

Considerable difficulty was experienced in ascertaining the facts of the collision. The parties united in seeking information, but the naval authorities of Great Britain and Italy refused assistance. Hence the evidence consists of logs and statements from such of the escorting vessels as were of the United States Navy, affidavits

or depositions from officers and men of the *Napoli* given in legal or administrative proceedings, and opinions rendered therein in Italy and England, together with excerpts from the manifest of the *Napoli*—all of which were submitted at the trial and admitted by stipulation (Record, pp. 24-7).

The cargo, the loss of which forms the subject of this suit, was protected against marine risks by libellant's so-called "marine policy" and against war risk by respondent's "war risk" policy. The policies did not, however, supplement one another. The assumption clause in respondent's war risk policy is:

"It is agreed that this insurance covers only the risk of capture, seizure, or destruction, or damage, by men-of-war, by letters of marque, by takings at sea, arrests, restraints, detainments and acts of kings, princes and people authorized by and in prosecution of hostilities between belligerent nations" (Exhibit B, Record, p. 14).

The f. c. and s. clause in petitioner's marine policy is:

"Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction and the consequences thereof or of any attempt thereat, and also from all consequences of riots, insurrections, hostilities or warlike operations, whether before or after declaration of war, and whether lawful or unlawful, and whether by the act of any belligerent nations, or by governments of seceding or revolting states, or by unauthorized or lawless persons therein, or otherwise" (Exhibit AA, Record, p. 13).

ARGUMENT

I

Preliminary considerations

1. Difference between the insurance clauses.

It is necessary to consider, at the outset, the phraseology of the policy in suit, for whatever general principles may be applied there can be no liability except upon a particular policy. According to uniform English insurance practice the language of the war risk policy is the counterpart of the f. c. and s. clause in the marine policy, *i. e.,* the former assumes and the latter excludes "all consequences of hostilities or warlike operations". It will be observed that while the f. c. and s. clause in the libellant's marine policy excludes "all consequences of hostilities or warlike operations", the respondent's war-risk policy covers "acts of kings, princes and people authorized by and in prosecution of hostilities between belligerent nations". Certainly the respondent's war-risk clause is no broader than the libellant's marine policy with its f. c. and s. warranty; it is quite clear that it is narrower.

(*a*) Effect of the words "all consequences".

If, however, it be taken as equivalent to "all consequences of hostilities or warlike operations", we point out that the words "all consequences" as used in this clause do not extend in any way the application of the hostilities or warlike operations to which they refer. This has been the established construction since the decision of the Court of Common Pleas in *Ionides* v. *Universal Marine*

Insurance Co., 14 C. B. (N. S.) 259 (1863). In that case Willes, *J.*, said:

"It has been argued that the ordinary rules of insurance law are not applicable to this policy, by reason of the words of the warranty 'all consequences of hostilities'. * * * I apprehend it is a fallacy to say that a larger sense is to be given to this exception by reason of the use of the word 'consequences' than if the word used had been 'effects'. In construing the exception, we can only look to the proximate consequences of hostilities. The introduction of the word 'all' really makes no difference, for no rule of grammar is more universally applicable than this, that words general and words universal are all one. The words 'all consequences of hostilities' refer to the totality of causes, not to their sequence, or their proximity or remoteness. * * * If you cannot presume the exception of loss from a consequence of hostilities to involve all consequence however remote, you are necessarily driven to say that the word 'consequences' is to be dealt with according to the ordinary rule, as meaning proximate consequences only" (pp. 289-291).

This construction has been repeatedly approved by the House of Lords.

Andersen v. *Marten*, [1908] A. C. 334, 339;

Leyland Shipping Co. v. *Norwich Union Fire Insurance Society*, [1918] A. C. 350, 365;

Britain Steamship Co. v. *The King*, [1921] 1 A. C. 99, 107, 131.

As Lord Sumner said in the latter case:

"They are used to save a long enumerative description of incidents of capture, seizure or detention or of hostilities or warlike operations, as if one had said 'all forms of hostilities or warlike operations of whatever kind', and some form or kind of hostility or warlike operations must have proximately caused the loss. Things of which it can be predicted that they were caused by hostilities are not themselves causes of loss additional to hostilities,

or a new description of perils insured against, so that a remote consequence of hostilities would become a recoverable loss if proximately caused by something itself describable as a consequence of hostilities" (pp. 131, 132).

2. The issue and burden of proof.

The petitioner's contention is that the act of sailing in convoy without lights is in and of itself a warlike operation, and that such marine disasters as may be expected to result from such dangers are themselves the result of warlike operations. Two questions, entirely separate and distinct, are involved in this issue: (*a*) Were these vessels engaged in hostilities or warlike operations which could have caused the collision; and if so, but not until that be found to be so (*b*), was the collision the proximate consequence of such hostilities or warlike operations.

> *Britain S. S. Co.* v. *The King,* [1921] 1 A. C. 99, 107, 109 (per Lord Cave), 127 (per Lord Sumner). And see the same case in the Court of Appeal, [1919] 2 K. B. 670.

If the first proposition be not established, the second cannot be.

Loss by collision at sea being *prima facie* a marine peril, the burden is on the petitioner to show that the loss falls upon the war-risk underwriter.

> *Britain S. S. Co.* v. *The King,* [1921] A. C. 99, 113, 119;
>
> *Munro Brice & Co.* v. *War Risks Association,* [1918] 2 K. B. 78.

On these issues the record before this Court stands thus: Circuit Judge Hough, sitting in the District Court, dismissed the libel, and in so doing was unanimously affirmed by the Circuit Court of Appeals composed of Circuit Judges Rogers, Manton and Mayer. Judge Hough found that the collision "resulted not only immediately but, in the legal sense, proximately from poor navigation on the part of both colliding vessels" (Record, fol. 256). On the question whether the navigation of merchant vessels in convoy without lights was a warlike operation, his conclusion was that "under authority to which for business purposes the courts of the United States should conform", it was not, although he indicated that his own opinion was otherwise (Record, fols. 256, 268). Accordingly, the final decree recites that his decision was "that the collision set forth in the libel was caused not by hostilities or warlike operations or consequences thereof, but by negligence, and that the loss must fall upon the marine underwriters" (Record, fols. 270, 271).

On appeal, Judge Manton, with whose conclusion Judge Rogers concurred, held that the colliding vessels were not engaged in a warlike operation, but that the proximate cause of the loss was faulty navigation (Record, fols. 284-292). Judge Mayer, concurring in a separate opinion, held that "if the District Court was right in ascribing fault to each vessel, yet such fault must be regarded as having been committed *in extremis*". On the question of warlike operation he concurred with Judge Hough, both in his personal opinion and in his decision that the commercial necessity of uniformity required the court to follow the established English doctrine (Record, fols. 293-295). Inasmuch as

Judge Rogers concurred with Judge Manton rather than with Judge Mayer, it is fair to assume that he did not agree with Judge Mayer on the only point in which Judge Mayer differed from both Judge Hough and Judge Manton. The result, therefore, is that of the four judges who have agreed in dismissing the libel, three concurred in the conclusion that the proximate cause of the collision was negligent navigation.

II

The vessels were not engaged in hostilities or warlike operations.

1. Construction of the terms "hostilities" and "warlike operations".

As construed by the English courts, the term "hostilities" connotes the idea of belligerents, and is used to describe actual operations, offensive and defensive, in the conduct of war. The expression "warlike operations" is said to have been added in 1883, in consequence of the operations of the British fleet at Alexandria against persons who were in rebellion against a friendly Power, in order to cover cases where similar acts were done before the actual outbreak of war. In effect, at all events, the addition has somewhat extended the category of acts referred to, even where war is in progress. But all the cases agree that the clause is not to be extended to mean all consequencs of the existence of a state of war. The phrase is "warlike operations", not "operations in time of war". It does not include even all operations for the purposes of war. It may be said to include all those

operations of a belligerent which form part of or directly lead up to those processes of attack and defense which are of the essence of war (Lord Chancellor Cave, [1923] A. C. at p. 198).

"If the operation relied upon as a warlike operation", said Lord Wrenbury in *Britain Steamship Co.* v. *The King,* [1921] 1 A. C. 99, 135, "is one which creates no new risk, but only aggravates or increases an existing maritime risk by removing something which, but for the war, would have been a safeguard against the risk, then the risk is not a war risk. But if the peril be directly due to hostile action, it is a war risk. Of the former of these, *Ionides* is an illustration. By reason of the war and for warlike purposes a light had been removed. Had it still been burning the master of the *Linwood* would have had the necessary warning to escape the danger into which he ran. The war did not create the risk but increased it. The cause of the loss was in going ashore. The loss was not a war risk. But, on the other hand, the vessel which tries to ram that which she believes to be an enemy vessel, the vessel which is rammed by a destroyer which is steaming in the dark without lights for a warlike purpose and which necessarily for the due performance of that duty turns across the route which a vessel would normally and properly take in that neighborhood, and the vessel which is lost by striking a mine, is lost by a new risk originating in and operative by reason of war."

This distinction between a cause and a condition has long been thoroughly established in English and American law. In *Ionides* v. *Universal Marine Insurance Co.,* 14 C. B. (N. S.), 259, to which Lord Wrenbury refers, cargo on board the ship *Linwood* was insured by a policy warranted free from all consequences of hostilities. On her way from New Orleans to New York, in 1861, her master, being out of his reckoning, and supposing that he had passed Cape Hatteras, instead of keeping his

course N. N. E., changed it to W., and consequently went ashore about ten miles south of the Cape. Until the outbreak of the Civil War a light had always been maintained at Cape Hatteras, but this light had been extinguished by the Confederate military authorities for hostile purposes. The Court of Common Pleas held that the proximate cause of the loss was a peril of the sea, and that the underwriter was therefore liable. We quote the reasoning of Byles, *J.:*

"The first question is, was the vessel lost through the absence of the light at Cape Hatteras? In order to raise that question, we must assume that, if the light had been there when the captain of the *Linwood* altered the course of his vessel on the evening of the 17th of July, he would have seen it, and, having seen and recognized it, would have had time to turn about and save the vessel. * * * Then, what were the three things which combined to cause the loss,—assuming that the captain would have seen the light if there, and so would have been warned in time to save the vessel? First, the original meritorious cause (and in popular language *the cause* of the loss) was the captain's being out of his reckoning. He was some fifty miles to the westward of his course, without knowing it. The absence of the light was, as I before observed, merely the absence of an extrinsic saving power. Could that be said to be the cause of the ship's destruction? Suppose a man throws himself into the Serpentine, and the means of rescuing him are not at hand, and he is drowned. Could it be said in that case that the man was drowned because of the absence of the saving power? Apply that here. The absence of the light at Cape Hatteras was but the absence of a warning, leaving the proximate and immediate cause of the loss, the miscalculation of the captain, which is plainly a loss by the perils of the sea" (pp. 295, 296).

In *William France Fenwick & Co.* v. *North of England Assn.,* 33 Times L. R. 437, where a vessel which struck the submerged wreck of a ship which had been

sunk a few hours earlier by an enemy submarine, the loss was held to be due to a marine risk. "All that can be said in the plaintiff's favor in this case is that but for hostilities this loss would not have been sustained; but the rule in insurance law is so rigid that that statement does not carry the plaintiff far enough" (per Bailhache, *J.*).

In *Muller* v. *Globe & Rutgers Fire Insurance Co.*, 246 Fed. Rep. 759, Judge Hough himself, speaking for the Circuit Court of Appeals for the Second Circuit, in a case arising out of the late war, said:

"We fully recognize it as a rule of law, supported by reason and the authorities quoted [among them the *Ionides* case], that a mere increase of sea peril, by removal for belligerent purposes, of all or any aids to navigation, does not *per se* afford ground for recovery under such war risk as this, in respect of a loss due to absence of accustomed assistance. Such act indeed, no more than restores the dangers of the seas to their normal."

The principle has often been applied by our courts. *Commercial Union Assurance Co.* v. *Pacific Union Club*, 169 Fed. 776; *Brown* v. *St. Nicholas Insurance Co.*, 61 N. Y. 332. In the former case a recovery was sustained on a fire policy with an exception against loss caused directly or indirectly by earthquake, although an earthquake on the preceding day had disrupted the city's water mains and prevented the use of the water supply in extinguishing the fire. "As well might it be said that the Company meant that it should not be liable for any loss or damage by fire which could be prevented by the use of the fire department of the City of San Francisco in the event that its use be prevented by the destruction of its

apparatus, or the killing or disabling of its men or horses, by an earthquake shock."

As applied to the subject-matter in issue by the House of Lords the reasoning is as follows:

"The *Petersham* was lost by collision by reason of navigation in the dark without lights. The risk of collision at night is an ordinary maritime risk. It was aggravated by the removal of the protection of the usual lights of navigation. This is governed by the principle of *Ionides,* which I think was right and which in fact counsel have not attacked. The *Matiana* was lost by going on a reef when sailing in convoy. To sail in convoy is to increase the every-day maritime risk of collision whether with a fixed object or with another vessel, for vessels in a convoy are necessarily not far apart. But there was no new risk. The abandonment of navigation lights in the case of the *Petersham* by way of protection against attack by submarine, the sailing in convoy in the case of the *Matiana* by way of protection against the like attack, are in principle similar. They are devices adopted by way of precaution in time of war which involve greater danger from maritime risks, which exist whether there is war or not. Their object is to give greater security to peaceful operations. It has been argued that to sail in convoy is a warlike operation. It is an operation adopted in time of war, but this does not, I think, make it a warlike operation. Not offence only but defence also may, no doubt, be a warlike operation, but a precautionary measure is not in itself a measure of defence. If it becomes necessary to use the weapon of precaution, no doubt a defence may commence. Thus, if here submarines had been sighted and the escorting vessel had ordered a notoriously dangerous course in order to avoid a peril of war—namely, submarine attack—and in consequence a vessel had gone on the rocks, the case would, I think, have been different."

Britain Steamship Co. v. *The King,* [1921] 1 A. C. 99, 135, 136 (per Lord Wrenbury).

2. The vessels were not engaged in hostilities.

"Hostilities" can have no application to this case. The word means hostile acts between enemies, and "consequences of hostilities" does not mean a consequence of war going on. Whether regarded as hostilities or a warlike operation, the submarine attack upon the westbound convoy five hours prior to the collision has no bearing on the issue. The only consequence of that attack was a change of course on the part of the convoy. But the convoy had resumed its prescribed course before the collision, at which time it was proceeding in all respects precisely as it would had there been no submarine attack. In other words, as the District Judge found:

"It is not believed that the torpedoing of a vessel in the westbound convoy five hours before meeting the eastbound fleet affected this matter at all, or if it did, it was pure ill luck. For all that the naval or navigating authorities did or expected to do (so far as this record shows) it was chance, and no more, whether the senior naval officers of the respective fleets did or did not steer courses that would intersect with those of the other convoy. And with each officer navigating (so far as shown) absolutely for himself, it was quite natural that each would steer for the middle of the passageway between Corsica and France, and that is exactly where they met. The one fairly certain result of torpedoing *Merida* (vessel T. B. westbound) was to slow up the convoy so far as getting toward Gibraltar was concerned. It is rather less than thirty nautical miles from the scene of *Merida's* mischance to that of collision, and it required five hours to make that distance. If the speed was anything over six miles (and estimates vary from 7.3 to 8.5), there was a great deal of 'zig-zagging' done; but all without any reference to the other convoy" (Record, fol. 257).

At the time of the submarine attack the course of the convoy was altered four points to the right, but later on, and before the convoys met, it was again altered four points to the left. Although it does not appear how long the convoy stood on these courses (Record, fols. 194-5), presumably the later change neutralized the former. There is no proof to the contrary. The commander of the *Yankton* supposed the convoy was off the course laid down before the attack because it was the practice to change courses frequently when submarines were in the vicinity. But he was unable to say this was so, since the *Yankton's* log shows no 8 P. M. position (Record, fol. 195). The purely speculative foundation for its assignment of error "in failing to find that the westbound convoy was off its course to the southward at the time of the collision as a result of the submarine attack" (Record, fol. 275), is disclosed by petitioner's brief:

"Just exactly what these changes of course were, we have not been able to ascertain because the *Yankton* was off her station and did not get all the messages (Burns, Record, fol. 195), and the communication log of the *Yankton* shows some signals which we have been unable to translate, as they are stated by Captain Burns (not in the Record) to have been given in typewritten code supplied specially for this voyage but not now available" (Petitioner's Brief, p. 11).

It is difficult to understand the materiality of this, considering that after the attack the convoy's course was twice changed to courses previously laid down. Regarding this Captain Burns testified:

"Q. Had the convoy during the afternoon received from the commodore any instructions as to changes of course at night? A. They did.

"Q. Will you tell us what those orders were, giving the letter signals that were received and the translation of them as far as you can? A. During the afternoon the commodore signaled that the course would be changed at 8:30 to 247° true, that course would be changed at 10:30 to 261° true, and that course would be changed at 1:30 A. M. July 5th to 251° true.

"Q. Were these orders carried out? A. They were" (Record, fol. 196).

There is nothing to show that these changes had anything to do with the presence of enemy submarines, much less with the attack.

Petitioner relies upon paragraph 5 of the Admiralty's letter of September 10, 1920 (Record, fol. 152). It is a mere conclusion, unsupported by any evidence, and there is no indication that the writer had any personal knowledge of the facts. Indeed, it is not clear to which convoy reference is made. Moreover, it is difficult to reconcile the contention with petitioner's express admission at the trial that the courses would have crossed in any event (Record, fol. 241).

3. The vessels were not engaged in a warlike operation.

This brings us to the inquiry whether there was a warlike operation in progress at the time of the collision. The petitioner relies upon three circumstances in support of its affirmative contention: (*a*) that the vessels were sailing without lights, (*b*) that they were proceeding in convoy, and (*c*) that the *Napoli* carried cargo destined for warlike uses. The respondent contends that these considerations, whether separately or conjointly considered, do not constitute a warlike operation.

a. Sailing without lights is not a warlike operation.

It is well settled in English law that sailing without lights does not constitute a warlike operation. As Rowlatt, *J.*, said in *Atlantic Transport Co.* v. *Director of Transports,* 38 Times L. R. 160, some confusion arose in the English courts of first instance in consequence of the failure to observe the manner in which the general subject was first presented in the *St. Oswald* case (*British & Foreign S. S. Co.* v. *The King,* [1917] 2 K. B. 769). That case involved a collision between a French warship and a requisitioned vessel, the *St. Oswald,* engaged with other vessels in the embarkation of troops from Gallipoli The vessels were operating at full speed without lights at night in an effort to withdraw troops from a battlefield without attracting the enemy's fire. This was obviously a warlike operation apart from the question of lights; but the point was not in issue because it was expressly admitted, and the only question decided was whether the collision was its proximate consequence. Rowlatt, *J.*, was explicit:

"I have, therefore, to determine," he said, "whether the collision here was the consequence of the steaming without lights by the suppliant's ship and the *Suffren* on this night, which the Attorney General admitted was a warlike operation" (pp. 772, 773).

In the Court of Appeal, which affirmed the decision below, Scrutton, *L. J.*, said:

"I deal with the case on this admission and reserve the right to consider in any future case the exact meaning of the term 'warlike operations'."

British & Foreign S. S. Co. v. *The King,* [1918] 2 K. B. 879, 886.

Although there was no further appeal in the *St. Oswald* case, when the issue as to warlike operations subsequently came before the Court of Appeal in the case of the *Petersham* (*Britain S. S. Co.* v. *The King,* [1919] 2 K. B. 670), all the judges of that court pointed out that their previous decision in the *St. Oswald* case was of no use in determining whether sailing without lights was a warlike operation. And when the House of Lords later on considered the general subject matter in reviewing the cases of the *Petersham* and the *Matiana,* reference was made to the fact that the *St. Oswald* case turned on an admission by the Crown. *Britain S. S. Co.* v. *The King,* [1921] A. C. 99, 128. The consequence of the failure to observe this admission was that in the first case in which the issue was presented, Roche, *J.,* considered himself bound to find, in view of the decision of the Court of Appeal in the *St. Oswald* case, that sailing without lights was a warlike operation. *Inui Gomei Kaisha* v. *Attolico,* Lloyds List, July 20, 1918. Inasmuch, however, as his actual decision was that the collision involved was proximately caused by negligent navigation, not by warlike operation, his views on saling without lights were *obiter* (see the observation by Bailhache, *J.,* in [1919], 1 K. B. at p. 582).

The English courts have uniformly held that sailing without lights was not a warlike operation. The issue first came before Bailhache, *J.,* in the case of the *Petersham* (*Britain S. S. Co.* vs. *The King,* [1919] 1 K. B. 575), where a vessel was lost in collision.

"The question I have to answer, in all its naked simplicity," said Bailhache, *J.,* "is this: Does the mere fact that, in order to avoid the common danger of attack by

submarines, a vessel upon a non-warlike errand in obedience to Admiralty regulations sails without lights, constitute a warlike operation? In my opinion it does not, ~~indicate admission~~. In my judgment the Admiralty regulation that vessels should navigate at night without lights greatly increased the risk of navigation, but left it a marine risk * * *."

This decision was unanimously approved by the Court of Appeal, [1919] 2 K. B. 670. Lord Justice Atkin's reasoning is this:

"The operation is the operation of conveying goods by sea from one commercial harbour to another. The risk of collision is an ordinary risk of such an adventure. It is true that the voyage is performed in war time and under war conditions. It is an operation in war, but not a warlike operation. Like many other peaceful operations conducted in time of war, it is conducted under different conditions to those of peace. The risks are increased; the risk of collision by sailing without lights; the risk of stranding by sailing on unaccustomed routes; the risk of foundering by difficulties in securing, when needed, necessary repairs. But to increase marine perils by reason of war is not to convert them into war perils. The warlike operation is said to be sailing without lights; I asked during argument whether, while the vessels were sailing by day, they were engaged in a warlike operation, or did they begin the warlike operation when the sun went down, and I am not conscious of having received an answer. If regard is to be had to the natural meaning of the words, it can be tested by reference to land operations. An omnibus is proceeding with dimmed lights in darkened streets in pursuance of Government orders made for the protection of a city and its inhabitants from attack by hostile aircraft; is the omnibus engaged in a warlike operation? And if by reason of the lack of light it collides with a wayfarer or another omnibus, is the resulting injury the consequence of a warlike operation? And was the wayfarer similarly engaged in a warlike operation? Lights are, in pursuance of the same order, darkened in a public building, and a visitor, by reason thereof, falls and injures himself; is he the victim of a

warlike operation? To these inquiries the sole answer of counsel was a courteous protest against the introduction of such mundane matters into the esoteric mysteries of marine insurance. I think, in the contention of the appellants, the major premise is flung far too wide" (pp. 696, 697).

This conclusion was unanimously affirmed by the House of Lords, [1921] 1 A. C. 99. Lord Sumner said:

"In showing no lights each was only doing what all ships did a few generations ago and what some ships did quite recently in unfrequented water to save a little oil. Sailing the seas even under conditions of modern maritime warfare is not in itself the same thing as traversing a battlefield on land, though even that may be done on a peaceful errand. To go ahead in the dark may be foolish or wise but it is not warlike, nor is it made warlike because what would otherwise be blameworthy is done in obedience to lawful commands. No doubt the object is to avoid being seen if the enemy is present, but if no enemy is present the act is a precaution only which fortunately is not needed. The operation of the *Petersham* and the operation of the *Serra* were in each case peaceable; neither was doing anything warlike separately, nor were they doing anything warlike together. Nor again was the operation of those who issued the order warlike, though it was performed in time of war. It did not become a warlike operation merely because its object was to baulk warlike operations on the part of the enemy" (p. 128).

b. **Sailing in convoy is not a warlike operation.**

With respect to convoys, Bailhache, *J.*, first held in the case of the *Matiana* (*British India Steam Navigation Co.* v. *Green,* [1919] 1 K. B. 632), where a vessel sailing in convoy through a submarine-infested area ran upon the rocks and was lost:

"To sail with convoy is, in my opinion, a warlike operation. The assembling of the ships to be convoyed and of the men-of-war to convoy them, the voyage of the whole

flotilla, the route chosen, and the precautionary measures adopted on the voyage, must be taken together as all part of a warlike operation."

The appeal from this decision in the *Matiana* case was argued and decided with that of the *Petersham* case, both in the Court of Appeal and in the House of Lords. *Green* v. *British & India Steam Navigation Co.,* [1919] 2 K. B. 670; [1921] 1 A. C. 99. In the Court of Appeal the judgment of the lower court was unanimously reversed. The same considerations that applied to the absence of lights were controlling in the case of convoy.

Lord Justice Atkin said:

"Following the reasoning I have adopted in the *Petersham* case, I come to the conclusion that the *Matiana* was not engaged herself in a warlike operation. But this is not sufficient in itself to decide the case; for it was urged that at any rate the loss was a consequence of a warlike operation by the commander of the escort in controlling the course of the convoyed ships. I doubt whether the giving of an order in itself can ever be an operation. That which is done under the order constitutes the operation; and to ascertain whether such operation is warlike or not, no doubt one must look to the function of the person giving the order as well as to the nature of the order and the person or persons by whom it is to be performed. But I will assume that in giving the order when he did to take a particular course, the commander was performing a warlike operation; was the loss the consequence of it? I think that the clause should be construed in accordance with the general principles of insurance law as covering only the consequences proximately caused by hostilities or warlike operations. For this view one has the great authority of Willes, *J.,* in *Ionides* v. *Universal Marine Insurance Co.,* 14 C. B. (N. S.) 259, 289, intended to be approved, I think, by Lord Halsbury in *Andersen* v. *Marten,* [1908] A. C. 339, 340. It seems to be unnecessary to discuss the precise words in which the necessary relation of cause and effect should be described: for the language has been finally settled in The Marine Insurance Act, 1906,

s. 55, sub-s. 1. * * * In the present case the naval commander changed the course at 9.3 P. M.; at 10 P. M. the order was given to zigsag; and at 12.15 A. M. the *Matiana* struck the Keith Reef. The actual loss was caused by an ordinary sea peril, stranding. It seems to me impossible to say that the naval officer directed her on to the reef; or that her striking was the inevitable or even the probable consequence of his order. That she struck the reef was a mischance. It could not be calculated. It was not proximately caused by the order. It was precisely the kind of mischance that constitutes a marine peril when voyaging on an unknown or uncharted route. No doubt by taking the course she was ordered, she was exposed to the risk of striking the reef; but in my view the true result of the order was merely to expose the ship to a greater chance of suffering a loss from marine peril. A naval order to incur marine risks by taking a dangerous channel, by sailing in a fog-bound area, by navigating at full speed, or, as in the last case, without lights, does not proximately cause the loss, if in fact the vessel suffers loss from collision or stranding" (pp. 699-701).

The House of Lords approved the judgment of the Court of Appeal by a vote of three to two, Lords Atkinson, Sumner and Wrenbury constituting the majority, Lords Cave and Shaw dissenting. The majority judges all repudiated the notion that the vessels convoyed became identified with the ships of war protecting them.

"To sail in convoy", said Lord Wrenbury, "is to increase the everyday maritime risk of collision whether with a fixed object or with another vessel, for vessels in a convoy are necessarily not far apart. But there was no new risk. The abandonment of navigation lights in the case of the *Petersham* by way of protection against attack by submarine, the sailing in convoy in the case of the *Matiana* by way of protection against the like attack, are in principle similar. They are devices by way of precaution in time of war which involve greater danger from maritime risks, which exist whether there is war or not" (pp. 135, 136).

Lord Sumner said:

"As for the *Matiana,* she was sailing with convoy. She was bound to take her course from the senior officer of the convoy and did so, and, thanks to the set of a variable current, she came unexpectedly on to the Keith Reef. Her operation also was proceeding on her trading voyage. It is true she did so by an unusual route but the deviation was justifiable and obligatory. She found in her way a rock, submerged and unlighted, which, in itself, was a marine peril. It was a moonlight night and, if there had been any wind, she would probably have seen the break of the sea on the reef in time. As it was a still night she had no warning and she stranded. Why is such a stranding a consequence of warlike operations? *The Matiana* had to do as she was told, but she was not told to go aground either directly or indirectly. I think that the case of *The Matiana* can only be distinguished from that of *The Petersham* by dwelling on the facts, first, that she was in convoy and, second, that, in addition to general orders as to not exhibiting lights, she was under particular orders as to the course to be shaped and the stations to be kept. In brief, sailing with convoy is only sailing in company and is no more a warlike operation than sailing alone. If, for the sake of protection in case of danger, the *Matiana* had kept as close as she could to a King's ship casually encountered, she would still have been peacefully occupied. What difference is made by additional orders given *ad hoc* by the senior naval officer? It is suggested that the case is the same as if he had been on her bridge, had himself laid and directed her course and had her steered straight on to the reef. Even if it were so, I am by no means prepared to say that this would have sufficed. Not everything done by a King's ship, or a King's officer, in time of war is necessarily a warlike operation or the consequence thereof. * * * It is not a case of deliberately running her aground for some purpose of war. Her course and station having been prescribed some hours before, she was in her own officers' charge, and there is no evidence to show or to suggest that the avoidance of a local obstacle in her track was not left to them, or that her orders were to keep her course, let the consequence be what it might. There is nothing to suggest that, if the rock had been

visible, she was not entitled and bound to manœuvre so as to avoid it. Her officers were not to blame, for they could not see it, but her inability to see the rock seems to me to be indistiguishable from the *Petersham's* inability to see the *Sera;* there was nothing warlike about it—the peril of it was of the seas. For the rest, an order given by an officer in company and in authority referring to a compass course does not really differ from an order given generally in Admiralty Regulations; it is a special order but it is an order to do or to refrain, like the general order as to lights. Warlike operations and hostilities generally prevailing supplied the reason for it, but even if it was a consequence of an operation of war the stranding was not its proximate consequence" (pp. 128-130).

The two minority judges were not in agreement in their reasoning. Lord Shaw was the only one of the eight judges who reviewed this judgment to take the view that the vessels under convoy, as well as those acting as convoy, were engaged in a warlike operation, [1921] 1 A. C. 124; he put it on the ground that the naval commander of the convoy was as much in control of the movements of the merchant vessel as if he had placed a naval officer on board or had the *Matiana* in tow. Lord Cave, the other minority judge in the House of Lords, took a different view:

"Nor, in my opinion, is it correct to say that the *Matiana* was herself engaged in any warlike operation. It is true that she was being convoyed by warships; but that was done for her protection against possible attack, and she herself formed no part of any attacking or defending force. In this respect I agree with Atkin, *L. J.*, who says: * * * 'The sheep are not the shepherd; and are not engaged in the operation of shepherding'" (pp. 109, 110).

The conclusion in which the two minority judges agreed was that the orders of the convoy commander in

prescribing the dangerous course was the cause of the loss. Lord Cave stated the case thus:

"But, assuming this to be the case, there remains the crucial question, whether the operation of the convoying vessels was the proximate or direct cause of the loss of the *Matiana*. I think it was. The inference which I draw from the facts above stated is that the loss was the direct consequence of the orders given by the naval officer in command to take the course which he prescribed. * * * In fact she was compelled to enter the area of danger by the orders of the officer commanding the escort, which she had neither the right nor the power to disobey; and I think the true conclusions is that those orders were the direct and determining cause of her loss" (p. 110).

But this Court has passed upon this very point. In *Morgan* v. *U. S.*, 14 Wall. 531 (more fully reported in 8 Ct. of Claims Repts. 18), it appears that the owner of a vessel had chartered her to the government during the Civil War. The vessel was manned by the owner; the Quartermaster's Department, United States Army, directed how she should be loaded and where she should go. The charterparty provided: "The war risk to be borne by the United States. The marine risk to be borne by the owners." The vessel took on board at Brazos, Texas, troops and stores for immediate transportation to New Orleans. The bar at the mouth of the harbor was difficult and dangerous; when the vessel was ready to proceed the wind was high and the water low. The quartermaster in authority at Brazos ordered a government tug to aid in taking the vessel over the bar; but she struck bottom, swung round inside the bar, and returned to her landing. The quartermaster, nevertheless, again ordered the vessel to proceed to sea. This order was given with full knowledge of the danger of crossing the bar, and

against the judgment of both the master of the vessel and the pilot; but the exigencies of the service, in the judgment of the quartermaster, required the attempt to be made. The master, under this order of the quartermaster, again attempted to go out, but the vessel struck heavily, and was damaged so much that, after discharging the troops and stores, she had to be towed to New Orleans. This Court held that the owner, not the government, must bear the loss:

"If, therefore, the stranding of the boat in going over the bar was owing to a peril of the sea, her owners, and not the government, must bear the loss. That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule *'causa proxima non remota spectatur'* we cannot proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel" (p. 535).

This case was cited with approval by this Court as recently as *New Orleans-Belize Royal Mail and Central American Steamship Co.* v. *United States,* 239 U. S. 202, 206. We submit that it disposes completely of the ground upon which the dissent in the convoy case is based.

Two other decisions in the Federal courts afford practical illustration of effect of the presence of a naval officer on board, the analogy suggested by Lord Shaw. Where the naval officer assumes control of the vessel's navigation and strands her, the loss is caused by a warlike operation. *Muller* v. *Globe & Rutgers Fire Insurance Co.,* 246 Fed. 759. Where the master retains control of the navigation, stranding is a marine peril. *The Llama,* 291 Fed. 1.

The passages from the opinion of Mr. Justice Johnson in *The Atalanta,* 3 Wh. 409, and of Mr. Justice Story in *The Nereide,* 9 Cr. 388, and from the language used by the Court of Claims, upon which the petitioner relies, relate to an entirely different issue, namely, the status of neutral vessels under belligerent convoy. But the distinction between convoyed merchantmen and their escort has been recognized from the earliest days of maritime warfare; it is recognized in the definition of convoy in 13 Corpus Juris, 931. The roles of the two classes of ships are entirely different. That of the ships of war is protective and, if need be, combative; that of the merchantmen is not at all combative, and as far as the circumstances permit, is as peaceful in character as would be their enterprises in time of peace. As Lord Justice Atkin said in the *Matiana* case, [1919] 2 K. B. 670, the sheep are not the shepherd and are not engaged in the operation of shepherding.

(1) Concerning convoy courses.

It is convenient to refer, in this connection, to a point made by the petitioner with respect to convoy courses. The libel alleges that the naval authorities so laid out the courses of the two convoys that they would meet in the course of their navigation; therefore, it is claimed, the collision was the result of the convoy regulations. But this argument is completely exploded by the petitioner's express admission at the hearing that the convoys would have crossed each other's course in any event (Record, fol. 241). Moreover, Judge Hough found the fact against the petitioner.

"It is not, however, true, that either convoy or both were obliged by orders given on or before departure to

pursue fixed courses for the entire contemplated trip. The westbound vessels were merely ordered after leaving a buoy outside Genoa harbor to take 'courses according to the signal of the Commodore', on *Ansoldo III;* while the eastbound fleet was given definite courses until such time as they should reach 42.58 N. and 7.50 E., from which position, called 'Genoa Rendezvous', they were to proceed 'according to instructions from Genoa', which so far as appears were never given. This point is about 70 miles from Genoa, and the place of collision was, according to the repeated statements of *Napoli's* master 43 N., 7.58 E. In other words the *Napoli* had proceeded beyond the limit of courses antecedently laid down, and was presumably taking whatever direction was ordered by Captain Ryan, R. N., as Senior Naval officer present. This is even more true if the *Lamington's* calculation of position be accepted,—43.8 N., 7.46 E. It is therefore not true that the convoys met by reason of pursuing courses predetermined for them at the places of departure" (Record, fols. 247-248).

In other words, each convoy was navigating for itself, just as each vessel would have done had it not been in convoy. If, as the petitioner has admitted, the courses of the convoys would cross in any event, it was obviously impossible for the Allied naval authorities to have laid out their course so that they would not meet. In complete ignorance, as we are, of the reasons which led the commanders of the convoys to take the courses that were actually taken, it would be rash to attribute any fault in this respect. And at all events, the absence of regulation, in any circumstances upon which neglect could be predicated, would be merely the absence of an extrinsic saving power, as in the other features of the voyage already discussed.

c. **The Ionides case considered.**

Some observations by Judge Hough and by Judge Mayer with reference to the decision of the Court of Common Pleas in *Ionides* v. *Universal Marine Insurance Co.,* 14 C. B. (N. S.) 259, require attention. According to their personal views, what they characterize the spirit of the *Ionides* case—namely, that precautions during war which merely heighten the known pre-existent perils of navigation, do not change in kind such perils—if valid at all, is inapplicable to the situation which existed in the late war, during which, as Judge Hough put it:

"Commerce existed only as an adjunct to war and for the purpose of creating and maintaining armed forces to insure the economic defeat of the enemy. The *Napoli* was taking a cargo from America to Italy, and even courts may take cognizance of the fact that in June, 1918, no such cargo was a possibility that did not in the opinion of governmental representatives from at least three governments (British, Italian and American) directly assist in the task of defeating Germany. In a large sense the very act of sailing was a consequence of hostilities. In short, almost every act of the warring countries after the home-staying population was fed, clothed and sheltered, was but a manifestation of war" (Record, fols. 265, 266).

For more than two generations the *Ionides* case has been relied upon by English and American courts and by text book writers as undoubted law. It is a striking tribute to its soundness that, although often referred to by the English courts in the course of the keen litigation during recent years, over the general subject matter under consideration, no judge, nor even counsel, questioned it (See the comment by Lord Wrenbury in the *Petersham* case, [1921] 1 A. C. at p. 135). Although it does not appear to have been cited by the Supreme Court,

it was cited by the late Justice Brown, while he was a District Judge, in *Richelieu & Ohio Navigation Co.* v. *Boston Marine Insurance Co.*, 26 Fed. 596, 605, with the comment that it was apparently "in full accord with that of the Supreme Court in the case of *Waters* v. *Merchants' Louisville Insurance Co.*, 11 Pet. 213."

It is clear that the *Ionides* case involved only the application of the doctrine of proximate cause, and it has no more direct relation to the issue here than the District Judge found that *Muller* v. *Globe & Rutgers Fire Insurance Co.*, 246 Fed. 759, had (Record, fol. 260). Unless and until be found, hostilities or warlike operations the question of proximate cause does not arise. But where, as in the *Ionides* case, there is, on one hand, hostile action in the extinguishment of the light by Confederate troops, and, on the other hand, a marine casualty in stranding, it becomes material, in an action on a marine policy warranted free of all consequences of hostilities, to ascertain whether the proximate cause of the loss was a marine peril or hostilities. In time of war, especially in an almost world-wide war, warlike conditions are omnipresent, and in determining whether a particular loss was proximately caused by one or the other a court necessarily deals with the distinction between causes and conditions as well as proximate and remote causation. This was done in an illuminating way in the *Ionides* case; the absence of the Hatteras light was a mere condition under which the vessel navigated. In this sense it may be proper to say that the "spirit" of the *Ionides* case triumphed in the *Petersham* and *Matiana* cases.

But the extent of a condition cannot limit the appli-

cation of the principle. The universality of a condition cannot convert it into a cause. The present case is a striking illustration of the necessity of holding fast to the distinction. Once the established legal landmarks are passed, there is no stopping point short of the conclusion that "every act of the warring countries after the home-staying population was fed, clothed and sheltered, was but a manifestation of war"; that in a legal, as well as in the "large sense" (referred to by Judge Hough), "the very act of sailing was a consequence of hostilities". If indirect assistance to the successful prosecution of war is a warlike operation, every subscriber to the Liberty Loans was engaged in a warlike operation when he bought his bonds.

***d.* The dominant factor is the nature, not of the cargo, but of the operation.**

Mr. Hann's affidavit (Record, fols. 232-241), deals with the nature of the cargo caried by the *Napoli*. The items selected were taken from the ship's manifest and from the shipper's export declarations, in most instances an obvious duplication. An effort was apparently made to select all cargo consigned by or to a public authority, although most of the items are otherwise colorless.

The facts with regard to the cargo of the *Napoli,* as found by the District Judge, are these:

"It is agreed that the major portion of her large cargo could fairly be described as general; but in Mr. Hann's affidavit libellants exhibit a list of cargo articles which they declare to have been 'intended for use by the Italian Government in prosecution of war'. The list is considerable in itself, but insignificant as compared with the lading of a vessel of *Napoli's* size. It is my opinion that this list contains certainly one and perhaps two articles which may be called munitions of war, to wit, certain

tubes for 'Italian 80-ft. sub-chasers', and 'Artillery case heading press'. The rest of the list is beyond question contraband, and more than conditional contraband, too, but that is all. But the goods are in my opinion no more closely allied to warlike operations or to the waging of war than was the asbestos which constituted the portion of the cargo insured by both parties to this litigation.

In the light of what is now history, it seems to me rather absurd to ground argument concerning the presence or absence of war-risk solely upon the nature of even an entire cargo, not to speak of the nature of scattered and numerically insignificant articles thereof. This because the war-risk was the same, no matter what the character of cargo. It is history that in the summer of 1918 the sea power of Germany outside the North Sea was represented solely by submarines whose object was to destroy commerce, and that meant to destroy ships, the nature of cargo was a matter of no consequence. * * *

But further, upon authority, it is the nature of the operation, not the character of the cargo, which is the material thing determining the query whether the vessel is engaged in an act of hostilities or in a warlike operation (*The Larchgrove,* 36 Times L. R., 108)" (Record, fols. 258-9, 262).

This is in accordance with reason and authority. On the issue of whether a vessel is employed in a warlike operation, the primary consideration is the nature or purpose of the operation in which she is engaged. This is the test suggested by Bailhache, *J.*, in the early case of the *Petersham,* and by McCardie, *J.*, in the recent case of the *Inkonka* (*Harrisons, Ltd.,* v. *Shipping Controller,* [1921] 1 K. B. 122). If a merchant ship be employed in the evacuation of troops from a battlefield, as in the *St. Oswald* case, doubtless she is engaged in a warlike operation. So if she be employed as a tender in a combatant fleet (*Hindustan S. S. Co.* v. *Admiralty Commissioner,* 37 Times L. R. 856), or used as an ambulance transport for the conveyance of wounded soldiers from France (*At-*

torney General v. *Adelaide Steamship Co.,* [1923] A. C. 292).

That the dominant object of the voyage controls has now been settled in England by the House of Lords. In the recent case of *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service,* [1923] A. C. 191, it appears that the steamship *Geelong,* then under requisition by the Government of the Commonwealth of Australia for transport service, while bound from Port Said to Gibraltar for orders, with a general cargo on Government account, was run into and sunk by the steamer *Bonvilston,* which was under requisition by the British Government and engaged in carrying ambulance wagons and other Governmental stores from one war base to another. Both vessels were proceeding, in accordance with Admiralty instructions, at full speed and without showing any lights. The House of Lords held that while the *Geelong* was not engaged in a warlike operation the *Bonvilston* was, and the loss was a war risk. Lord Chancellor Cave said:

"When the arbitrator found that the *Bonvilston* was under requisition by the British Government, and was 'carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria)', he must assuredly have intended the court to understand that the cargo consisted of war material of the above character which was being transported from one war base—that is to say, from a point behind a fighting front from which the forces engaged on that front might be fed with men, munitions and supplies—to another war base for war purposes" (p. 198).

That is to say, the combative purpose of the transportation was the decisive factor. And his opinion was that the expression "warlike operation" "includes all those op-

erations of a belligerent Power or its agents which form part of or directly lead up to those processes of attack and defense which are of the essense of war." On the other hand, he said:

"Plainly it does not include all operations in war or even all operations for the purpose of war. For instance, the *Petersham* which was carrying iron ore to be used in the manufacture of munitions, and the *Matiana*, which was carrying cotton which might well have been intended to be used for the clothing of troops, were held by all the members of your Lordships' House who heard the appeals in those cases, not to be engaged in warlike operations. *Britain Steamship Co.* v. *The King*, [1921] 1 A. C. 99" (pp. 198, 199).

e. The necessity of uniformity in the international business of marine insurance is itself a sufficient reason for following the construction now firmly established in English law.

We submit that the consideration which, in the end, was persuasive with Judge Hough, is, indeed, unanswerable. After stating the issue presented by the libel, he said:

"It would be a professional pleasure to feel at liberty to treat both these questions from what I regard as the standpoint of reason; but I do not think that pleasure can be accorded. The question is not one of morals, nor of public policy; it is no more than the interpretation of certain forms of words, which are not sacred, which have varied and may be changed at any time to suit the apparent necessities of commercial profit. The important thing is to secure uniformity of view in a commercial world which now embraces and long has included more than one continent and more than one ocean. I shall, therefore, briefly state my own view and decide this case on what I conceive to be authority" (Record, fol. 264).

And he found that

"it must be held under authority, to which for business purposes the Courts of the United States should con-

form, that the collision in question was not proximately caused by any act of hostility or by the consequences thereof; because the act of joining a convoy, the act of sailing therein without lights, and the act of steering courses directed by naval authority are not, whether separately or conjointly considered, to be regarded as a warlike operation" (Record, fol. 268).

This is the large and common sense view of the situation. The universal custom of reinsurance is well known. Without reinsurance in the vastly larger English field American underwriters could not begin to accommodate the home market. The American owner would be forced to go direct to English underwriters because American underwriters could not afford to incur the risk. The business is carried on through reinsurance. If, then, in view of the immense volume of marine insurance placed during the late war, the courts here decide this fundamental question contrary to the view now firmly established in English law, the insurance world will be involved in turmoil.

In the Circuit Court of Appeals, Judge Mayer concurred with Judge Hough in recognizing "the commercial necessity" of following the English decisions.

"The questions in the case at bar," he said, "are not local, but affect an important class of world wide business in which the relations are so interwoven and connected that it would be unfortunate and confusing if a court of less authority than the Supreme Court of the United States were to arrive at a result different from that reached by the House of Lords" (Record, fol. 295).

We submit that the conflict of authority could not, in the nature of things, be less unfortunate or confusing if brought about by a decision of this Court.

III

The proximate cause of the loss was the negligent navigation of the colliding vessels.

The District Court found that the collision "resulted not only immediately, but, in the legal sense, proximately, from poor navigation on the part of both colliding vessels" (Record, fol. 256). And the decree, under the mandate of the Circuit Court of Appeals, recites "that the collision set forth in the libel was caused, not by hostilities or warlike operations or consequences thereof, but by negligence, and that the loss must fall upon the marine underwriters" (Record, fols. 270, 271).

The situation at the time the vessels in the first tier of each convoy sighted the other, as found by the District Court (Record, fols. 248-254), was this: Upwards of thirty-five vessels with their accompanying escorts, divided into two approximately equal fleets, were approaching each other nearly end on. The vessels in each convoy were arranged in three tiers, about 600 yards apart. The space between the vessels in each tier was about 500 yards. The first tier of each convoy, containing the largest number of vessels, therefore, presented a front of about two nautical miles. The convoys approached each other at a combined speed of between fourteen and fifteen knots an hour (Record, fol. 251). When the loom of the other ships appeared and both fleets turned on their navigating lights, the distance between the head tiers was about three-quarters of a nautical mile (Record, fols. 250, 252). More than three minutes elapsed, therefore, between the turning on of the navigating lights and the collision. Or, as the District Judge put the limits, "there could not have been

more than two thousand yards between *Napoli* and *Lamington*, when the navigating lights were flashed on, and the time between that moment and collision could not have been more than five minutes and quite probably less" (Record, fol. 256).

Under such circumstances it is "plain beyond argument", as the District Court said, that "the duty of every navigator was to slow down to steerageway and stick as nearly to his course as possible in the hope that the vessels of each fleet would pass through the lanes between the fore and aft lines of the other fleet" (Record, fol. 253). He points out that this is what most of the steamers must have done; otherwise it is inconceivable that among so many vessels there should have been only two other collisions. In respect of the two other collisions that did occur, the Italian Investigating Commission found that they were due to faulty navigation—one, because a vessel never turned on her navigating lights, and the other because a vessel failed to reverse her engines and to give the three regulation warning whistles (Record, fol. 253).

Both the *Napoli* and the *Lamington* failed to meet this simple test. As the convoys approached each other, their courses and speeds were such that, if maintained, there would have been a collision between the *Napoli* and the *Ansoldo III*. In these circumstances both vessels ported and passed each other port to port (Record, fols. 117, 156, 161, 253-4). Obviously, the *Napoli* should have steadied her helm and straightened up on her course down the lane between the oncoming columns of ships (Record, fols. 252-3). Instead she continued to bear to starboard or, still worse, indulged in what may be called a "serpentine" (Record, fol. 161).

After zigzagging about in this erratic way—a course in itself calculated to bring on collision—the *Napoli* did perhaps the most foolhardy thing possible—stopped dead in the water and in effect invited collision with any ship that might come her way (Record, fols. 157, 161). This seems particularly inexcusable when it is remembered that the *Napoli* was a twin-screw vessel and therefore able to manœuvre more readily and assist her helm (Record, fol. 159). It was also Mr. Justice Hill's judgment that the immediate cause of the collision was the porting of the *Napoli* (Record, fol. 231).

The *Lamington,* also, was guilty of fault sufficient to cause the collision. She maintained her speed into the jaws of collision. Her speed is found to have been from six to seven knots (Record, fols. 251, 254). That this was, in the circumstances, altogether excessive, is perfectly plain.

Accordingly the District Court found as facts that both the vessels here involved navigated faultily:

"the *Napoli* in that having ported to such an extent that she ought to have known she was getting in the way of the next fore and aft convoy line, stopped and (as it seems to me) invited collision with any vessel in that line that came up out of the night, while the *Lamington* was at fault for maintaining so great a speed that she could not possibly take off her way before colliding with whatever she could clearly make out ahead. It may be noted that the speed of the *Lamington* is not only admitted, but would necessarily be found from consideration of the violent blow she struck the much larger and more powerful *Napoli*" (Record, fol. 254).

In the similar case of *Inui Gomei Kaisha* v. *Attolico,* Lloyd's List, Feb. 10, 1919, where the vessels were sailing without lights, the Court of Appeal applied the test with even greater strictness, for there the approaching vessels sighted each other at a distance of

one-half to three-quarters of a mile, and the collision occurred between two and three minutes later. Yet it was held that there was sufficient opportunity to form and to exercise a reasonable judgment.

Finally, we come to the contention that, whatever the faults in navigation, they may be excused as errors *in extremis*. This argument is based upon the conclusions of the Italian Investigating Commission (Record, pp. 138-147) and the proceedings before Mr. Justice Hill (Record, fols. 224-231). Each really attributes the result to the vessel of foreign nationality, and then extenuates the errors of both in view of the extremity. The District Court reviewed these findings, and came to the conclusion that "such excusatory remarks as this amount to a refusal to find fault whenever the circumstances are sufficiently alarming to furnish some excuse for losing one's head" (Record, fols. 255, 256). Having regard to the time available after navigating lights were turned on, the perfectly obvious nature of the course which the situation called for, and the safety with which most of the vessels navigated, we submit that the argument of *extremis* is not tenable. After all, seamen frequently have to act on the spur of the moment, and it is desirable that the standards of action should be maintained. The same contention was made in *Inui Gomei Kaisha* v. *Attolico, supra,* with as little success.

It is respectfully submitted that the decree should be affirmed.

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